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No. 89-1836

In the Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, which restricts extrajudicial attorney statements concerning pending litigation, violates the First Amendment.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, a criminal defense attorney in Las Vegas, Nevada, represented a client charged with grand larceny, drug trafficking, and racketeering. In response to adverse publicity about his client, petitioner held a press conference, attended by the electronic and print media, the day after his client was indicted. In the course of his statements at the press conference, petitioner vouched for his client's innocence;[1] said that his client

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[1] Petitioner stated:

> I know I represent an innocent man, Allen.
>
> The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?
>
> I don't take cheap shots like this. I represent an innocent guy. All right?

Pet. App. 12.

was a "scapegoat," Pet. App. 8a; attacked the credibility of potential prosecution witnesses, calling them drug dealers and money launderers, *ibid.*; and named a police detective, who he knew would be a prosecution witness, as a drug abuser and the likely perpetrator of the crime.[2]

The trial of petitioner's client took place approximately six months later. Petitioner's client was acquitted on all charges.

2. On December 6, 1988, the State Bar of Nevada filed a one-count complaint against petitioner alleging a violation of Nevada Supreme Court Rule 177. R. 8-9. That provision is identical to ABA Model Rule of Professional Conduct 3.6. It states in pertinent part:

> 1. A lawyer shall not make a extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to * * * a criminal matter * * * and the statement relates to:
>
> (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness * * *.
>
> * * * * *
>
> (d) any opinion as to the guilt or innocence of a defendant * * * in a criminal case * * *;
>
> * * * * *
>
> 3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

[2] Petitioner stated: "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being." Pet. App. 8a.

> (a) the general nature of the claim or defense;
>
> * * * * *
>
> (c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved * * *.

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar of Nevada found that petitioner had violated Rule 177 and recommended that he be privately reprimanded. The Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. R. 18. It also found that petitioner believed others who petitioner characterized as money launderers and drug dealers would be called as prosecution witnesses. *Ibid.* In light of the contents, the setting, and the timing of petitioner's statements to the media, the Board concluded that petitioner knew or should have known that those statements would have a "substantial likelihood of materially prejudicing" the fairness of his client's trial. R. 20.

3. Petitioner took an appeal to the Nevada Supreme Court, which affirmed the Board's decision. Pet. App. 2a-5a. The court found by "[c]lear and convincing evidence" that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* at 3a. In so finding, the court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments improperly "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses * * *." *Id.* at 4. Although the court found that the comments caused "no actual prejudice in this case," it concluded that "ab-

sence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.* The court rejected petitioner's contentions that his comments were permitted by Section 3 of Rule 177, and that the Rule violated his right to free speech under the federal and Nevada constitutions. *Ibid.*

DISCUSSION

Petitioner contends that Nevada Supreme Court Rule 177 violates the First Amendment. He argues that by employing the standard of "substantial likelihood of material prejudice," Rule 177 impermissibly restricts extrajudicial comments by attorneys when those comments do not present a "clear and present danger" or a "serious and imminent threat" to the fair administration of justice. Petitioner argues further that parts of Rule 177 are unconstitutionally vague.

In our view, petitioner has not advanced a colorable constitutional claim. The First Amendment does not require that a State demonstrate a "clear and present danger" to the fairness of a pending judicial proceeding before it may restrict an attorney's freedom to comment on that proceeding. Because of the special status of lawyers in the judicial system, we believe that state ethical codes may constitutionally regulate attorneys' comments on judicial proceedings whenever it appears reasonably likely that the comments will adversely affect the fairness of those proceedings.

It is not necessary to decide that constitutional issue in this case, however, because the pertinent ethical rules adopted in 24 States, including Nevada, are patterned after the ABA's Model Rule of Professional Conduct 3.6,[3]

[3] Rule 3.6 has been adopted by 18 States without change and by 6 States with revisions. The 6 States are Florida, Illinois, North Carolina, and Oklahoma, in which the Rule was extensively revised; Michigan (and the District of Columbia), in which everything after the first paragraph was deleted; and Texas, in which the comment was extensively revised.

which was drafted to satisfy the "clear and present danger" standard. The rule that was applied in petitioner's case therefore satisfied the First Amendment even if the "clear and present danger" test is constitutionally required in this setting. Moreover, the Disciplinary Board and the Nevada Supreme Court were correct in concluding that petitioner's inflammatory comments were subject to censure under that standard. Finally, there is no substance to petitioner's contention that Rule 177 is void for vagueness.

1. Nevada's ethical rules governing attorney comments on pending litigation do not offend the First Amendment. Petitioner's argument to the contrary depends on his assertion that "the proper inquiry should be whether the speech itself presents a clear and present danger to the fairness of a judicial proceeding." Pet. 11 n.5. If petitioner is wrong, and the First Amendment permits States to regulate lawyers' comments on pending litigation whenever comments are reasonably likely to prejudice the administration of justice, then petitioner has no plausible constitutional defense to the private reprimand at issue in this case.

It is well settled that the right to publish lawfully obtained information relating to a pending proceeding may be denied only if publication threatens a governmental objective of the highest order (a "clear and present danger"), usually to the fairness of an accused's trial. See, *e.g.*, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 101-106 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837-845 (1978); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310-312 (1977) (per curiam); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 556-570 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487-497 (1975).

Different considerations, however, apply to a lawyer's authority to divulge information relating to a pending proceeding. A lawyer has a professional obligation not to make comments that appear reasonably likely to en-

danger the fairness of his client's trial.[4] A lawyer is not in the same position as private citizen with respect to the judicial system. Rather, the lawyer has a "fiduciary obligation to the courts." ABA Standards for Criminal Justice, *Fair Trial and Free Press* 82 (1968). The right to regulate attorney comments regarding judicial proceedings is an aspect of the States' broad power to regulate the practice of law, a power that is "especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); see *In re Primus*, 436 U.S. 412, 422 (1978); *Cohen* v. *Hurley*, 366 U.S. 117, 123-124 (1961) (courts have for centuries possessed authority "over members of the bar, incident to their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied. * * * [L]awyers must operate * * * as assistants to the court in search of a just solution to disputes.").

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[4] Courts have recognized that "restricting the extrajudicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process." *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982). As the court stated in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), "public justice is no less important than an accused's right to a fair trial." See *Hirschkop* v. *Snead*, 594 F.2d 356, 366 (4th Cir. 1979) (en banc).

Petitioner does not suggest that the protection of trial fairness is an insufficiently compelling governmental interest to warrant restrictions on attorney statements to the media concerning pending criminal litigation. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court called on courts to promulgate rules protecting their processes from prejudicial outside interference, and explicitly stated that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id* at 363; see *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring in the judgment).

The lawyer's duty to his client does not override these interests. In situations in which an accused wishes publicly to insist on his innocence, he can always make a statement himself or through a spokesman. That he insists that his lawyer do so may reflect that he wants more than simply to voice his side of the story. He wants his attorney to make his case for him in public, because the special knowledge and high standards to which his attorney is held makes his attorney more likely to be believed. Yet it is precisely those special features of his attorney's status that can make his inflammatory remarks especially inimical to the fairness of the judicial proceedings on which he is commenting.

A lawyer's First Amendment right to make extrajudicial comments on a pending proceeding is on especially weak ground when the information he seeks to disseminate is a byproduct of the State's license to practice law. By virtue of the status conferred on him by the State, a lawyer often enjoys special access to information about a case from such sources as pretrial discovery and plea discussions with prosecutors. The State, we submit, can lawfully condition the lawyer's right to practice law on his exercise of responsible restraint in using the information that comes to him by dint of his state-conferred license.

The diminished role of the First Amendment in such a setting is illustrated by *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), in which this Court held that a newspaper could be prevented from publishing information that it had obtained through pretrial discovery. Because judicial discovery proceedings grant the parties special access to information for specific, limited purposes, the Court concluded that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34.

The Court's decision in *Snepp* v. *United States*, 444 U.S. 507 (1980), likewise suggests that the special right of access to information granted to certain persons may constitutionally carry with it a fiduciary duty to follow "reasonable restrictions" on the dissemination of that information. *Id.* at 509 n.3. Upon joining the Central Intelligence Agency, Snepp signed a contract in which he undertook an obligation "not to publish *any* information relating to the Agency without submitting the information for clearance." *Id.* at 511 (emphasis in original).[5] Snepp violated that obligation when he published the book *Decent Interval* after leaving the Agency without first presenting it for review. *Ibid.* This Court enforced Snepp's fiduciary obligation and upheld the imposition of a constructive trust on all profits from the sale of the book. *Id.* at 516. It did so even though the United States conceded that "Snepp's book divulged no classified intelligence." *Id.* at 510. The Court reasoned that Snepp could be held to "reasonable restrictions" on the dissemination of information potentially undermining the Agency's activities. *Id.* at 509 n.3, 511. So too, through ethical rules an attorney's status as a member of the bar imposes duties on him, in handling information that comes to him only because of his special status, analogous to the duties imposed by the employment contract in *Snepp*.

The distinction between attorney and non-attorney speech finds additional support in *In re Sawyer*, 360 U.S. 622 (1958). In that case, a majority of the Members of this Court agreed that ethical precepts can require attorneys to abstain from what would otherwise be constitutionally protected speech. *Id.* at 646-647 (Stewart, J., concurring); *id.* at 668 (Frankfurter, J., dissenting). State regulation of an attorney's comments implicating

[5] Snepp's obligation was contractual, see 444 U.S. at 508 & n.1, but this Court noted that the prohibition on publication absent clearance could be imposed "even in the absence of an express agreement." *Id.* at 509 n.3.

the fairness of his client's trial is also consistent with this Court's repeated recognition of trial judges' broad latitude to restrain lawyers' statements regarding trials over which they preside:

> [O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 529, 563 (1976); *id.*, at 601 and n. 27 (Brennan, J., concurring in judgment); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310-311 (1977); *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 104, n. 21 (1981).

Seattle Times Co. v. *Rhinehart*, 467 U.S. at 33 n.18.

In sum, two complementary considerations—the lawyer's special access to information and his special duty to ensure that its release does not prejudice pending proceedings—justify the State in imposing reasonable restrictions on the dissemination of information in settings in which similar restraints could not constitutionally be imposed on ordinary citizens. Nevada Supreme Court Rule 177 proscribes only those comments a lawyer knows (or reasonably should know) "have a substantial likelihood of materially prejudicing an adjudicative proceeding." Since the First Amendment, in our view, permits States to restrict extrajudicial attorney statements that are "reasonably likely" to jeopardize the fairness of pending proceedings, it follows that petitioner's private reprimand does not violate the First Amendment.

2. For the reasons set forth above, we submit that the First Amendment does not limit state regulation of attorney comments on pending litigation to situations in which commentary poses a "clear and present danger,"

as petitioner assumes. Nonetheless, Nevada and the other 23 States that have adopted ABA Model Rule of Professional Conduct 3.6 have in effect adopted that standard as a matter of policy. Because the Nevada Supreme Court applied that standard to the statements at issue in this case, petitioner has already received the benefit of the lenient standard that he asks this Court to adopt as a matter of constitutional mandate.

The "substantial likelihood of material prejudice" standard set out in ABA Model Rule 3.6 (and in Nevada Rule 177) was fashioned to "approximate[] clear and present danger by focusing on the likelihood of injury and its substantiality." ABA Annotated Model Rules of Professional Conduct 243 (1984). Under that standard, "the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)." G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 397 (1985); see *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 493 (1982) (recognizing that "substantial likelihood of material[] prejudic[e]," like "serious and imminent threat," is a "linguistic equivalent[]" of "clear and present danger"). Accordingly, the decision of the Navada Supreme Court to uphold the disciplinary action against petitioner under the "substantial likelihood of material prejudice" standard creates no conflict with the First Amendment even if the "clear and present danger" test is constitutionally required in this setting.

a. Petitioner does not view the "clear and present danger" test and the "substantial likelihood of material prejudice" test as equivalent. He contends that the latter lacks any requirement of temporal proximity. But strict temporal proximity is not a necessary element of the "clear and present danger" test, particularly in this setting. In *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), this Court stated that the "clear and present danger" test was "never intended to 'to express a technical legal doctrine or to convey a formula

for adjudicating cases.'" *Id.* at 842 (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring)). Rather, in the context of statements affecting judicial proceedings, the test requires courts to examine "'the particular utteranc[e] * * * in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.'" *Landmark Communications*, 435 U.S. at 844 (quoting *Bridges* v. *California*, 314 U.S. 252, 271 (1941)); see *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 562 (quoting *United States* v. *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.) (test is whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"), aff'd, 341 U.S. 494 (1951)). The annotations to Rule 3.6 indicate that the "substantial likelihood of material prejudice" test is to be applied according to the approach described in *Landmark Communications* and that a significant factor in determining "the seriousness and imminence of the threat [is] the timing of the statement." Annotated Model Rules, *supra*, at 243.

There is no merit to petitioner's suggestion that under the "clear and present danger" test attorney statements must in all cases cause "immediate harm." Pet. 12-13. If that were so, only statements made during or on the eve of trial could be regulated, and attorneys would be free to make the most outrageously prejudicial comments during the pretrial period. The Seventh Circuit addressed this point in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (1975), cert. denied, 427 U.S. 912 (1976). Although the court applied a version of the "clear and present danger" test, it stated that several types of attorney comment may be prohibited during the period from arrest or indictment to the commencement of trial. *Id.* at 254. As the court explained, because the possibility of prejudice at that stage becomes "concrete," and be-

cause of the need to "prevent[] the appearance that the merits of a particular pending prosecution are being tried in the press," the "balance [during the pre-trial period] swings more toward the necessity of prohibiting certain speech * * *." *Id.* at 253-254.

b. Petitioner intimates, Pet. 8, 11, that actual prejudice must be shown before an attorney can be disciplined for his extrajudicial comments. That contention is likewise insubstantial. Courts have uniformly held that an attorney may be disciplined for his extrajudicial comments based on the likelihood of prejudice to pending judicial proceedings at the time the comments were made; no court has suggested that an actual effect must be proved. See *In re Conduct of Lasswell*, 296 Or. 121, 673 P.2d 855, 858 (1983) (the disciplinary rule properly "deals with purposes and prospective effects, not with completed harm").

If actual prejudice were required, even manifestly unethical attorney comments having a substantial likelihood of prejudicing pending proceedings could not result in disciplinary action whenever it subsequently turned out—even for wholly fortuitous reasons—that no actual prejudice occurred. For example, a defense attorney who made blatantly improper and prejudicial comments might be immune from punishment merely because the government, for reasons unrelated to the comments, decided to dismiss the charges against his client, because his client subsequently chose to enter a guilty plea, or because the government ultimately obtained a conviction despite the prejudicial publicity engendered by the comments. Under such a regime, the deterrent impact and uniform application of disciplinary rules regulating extrajudicial attorney comments would be seriously undermined. The fundamental flaw in petitioner's argument is its failure to recognize that attorney comments posing a substantial threat to the fairness of pending proceedings are in themselves deserving of punishment, regardless of their ultimate effect, much as a failed attempt to commit a

crime is no less illegal for the fact that the crime was unsuccessful.

c. As petitioner points out, courts have employed a variety of verbal formulas in determining whether a threat to the fairness of judicial proceedings from attorney statements is sufficiently great to warrant disciplinary action. Besides the "substantial likelihood of material prejudice" test set forth in ABA Model Rule 3.6 (and applied by the Nevada Supreme Court in this case), the three other commonly applied tests are "clear and present danger," "serious and imminent threat," and "reasonable likelihood" of prejudice.

In *Markfield* v. *Association of the Bar*, 49 A.D.2d 516, 370 N.Y.S.2d 82, appeal dismissed, 337 N.E.2d 612 (1975), a New York court held that attorney comments on a judicial proceeding can be restricted only if they pose a "clear and present danger" to the fair administration of justice. In so doing, the court relied on decisions of this Court that have invoked that standard in reviewing contempt citations against *non-attorneys* for comments or publications relating to pending judicial proceedings. See *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Bridges* v. *California*, *supra*.

Some courts have required that attorney statements present a "serious and imminent threat" to the fair administration of justice. See *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d at 249; *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971); *United States* v. *Garcia*, 456 F. Supp. 1354 (D.P.R. 1978); cf. *Levine* v. *United States District Court for the Central District of California*, 764 F.2d 590, 596-598 (9th Cir. 1985) (applying "serious and imminent threat" test in reviewing trial court "gag" order); *Chase* v. *Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (same). This standard derives from *Craig* v. *Harney*, 331 U.S. at 373, 375, in which the Court used the phrase "serious and imminent threat" interchangeably with "clear and present danger." Previously, in

Bridges v. *California*, 314 U.S. at 263, the Court described the "clear and present danger" test using the same phraseology. See also *Pennekamp* v. *Florida*, 328 U.S. at 334.

Most courts that have addressed the issue have held that a "reasonable likelihood" of prejudice to a fair trial is sufficient to justify restrictions on attorney comments. See, *e.g.*, *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Hughes* v. *State*, 437 A.2d 559 (Del. 1981); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *Widoff* v. *Disciplinary Board*, 420 A.2d 41 (Pa. 1980), aff'd, 430 A.2d 1151 (Pa. 1981), appeal dismissed, 455 U.S. 914 (1982); *Zimmerman* v. *Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), cert. denied, 109 S. Ct. 3160 (1989); *In re Disciplinary Proceeding Against Eisenberg*, 144 Wis. 2d 284, 423 N.W.2d 867 (1988); cf. *United States* v. *Tijerina*, 412 F.2d 661, 667 (10th Cir.) (applying "reasonable likelihood" test in reviewing trial court "gag" order), cert. denied, 396 U.S. 990 (1969); *Younger* v. *Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (same); *People* v. *Dupree*, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (same).[6] These courts rely to a considerable extent on the unique status of attorneys as "officers of the court" with a special responsibility to protect the administration of justice, and thus they find this Court's First Amendment decisions concerning restrictions on non-attorney speech inapplicable. See *Hirschkop*, 594 F.2d at 366; *In re Hinds*, 449 A.2d at 489. The courts adopting the "reasonable likelihood" standard also rely on this Court's statement in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), that "where there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity" (emphasis added). The *Hirschkop* court explained: "If remedial action is required on the basis of a reasonable likelihood test, * * * the rules for the avoidance of the harm must be considered under the same test. Implicitly * * * the Supreme Court must have approved the reasonable likelihood standard for the application of the preventive rules." 594 F.2d at 370.

[6] The federal regulations governing the release of information relating to pending criminal proceedings by Justice Department personnel employ the "reasonable likelihood" standard. See 28 C.F.R. 50.2(b)(2).

As we have noted, the test applied in this case and the "serious and imminent threat" test are both equivalent to the "clear and present danger" standard. Some courts maintain that there is no significant difference even between the "reasonable likelihood" test and the variants on the "clear and present danger" test adopted by the remaining courts. See *Hirschkop*, 594 F.2d at 368; *Zimmerman*, 764 S.W.2d at 763; see also Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 Cornell L. Rev. 1106 (1980) (arguing that there is no significant difference between the tests). In any event, petitioner has in effect had the benefit of the "clear and present danger" standard, since petitioner's statements were found to create a "substantial likelihood of material prejudice" to the fairness of his client's trial. The outcome here thus does not turn on the legal standard applied; as a result, this case is not an appropriate vehicle to probe the outer limits of permissible state regulation of attorney speech.

3. The question whether the comments petitioner made at his press conference satisfied the "substantial likelihood of material prejudice" test does not warrant this Court's review. In light of the considerable publicity attending the case, the deliberate timing of the press conference for maximum impact, and the inflammatory nature of the comments themselves, it was reasonable for the Nevada Supreme Court to conclude that petitioner's comments met the standard set forth in Rule 177. Petitioner argues that the availability of remedies such as extensive jury voir dire, a change of venue, and post-

ponement of the trial reduced the likelihood of prejudice from his comments. The availability of those measures, however, does not preclude imposition of restrictions on attorney speech. See *In re Hinds*, 449 A.2d at 494-495 n.5; *People* v. *Dupree*, 388 N.Y.S.2d at 209. As this Court noted in *Sheppard*, 384 U.S. at 363, when it urged the adoption of regulations governing extrajudicial attorney statements, courts in criminal cases have an overriding obligation to "prevent * * * prejudice at its inception."

4. Nor is there any merit to petitioner's claim that Rule 177 is unconstitutionally vague. A statute or rule may be void for vagueness if it fails to give "fair notice to those to whom [it] is directed." *Grayned* v. *City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)). Statutes and rules must be framed in "terms susceptible of objective measurement," *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286 (1961), and be capable of being understood and applied by "the ordinary person exercising ordinary common sense," *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). The Court has recognized that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms' [because] [u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (footnotes omitted) (quoting *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964), and *Cramp*, 368 U.S. at 287)).

Petitioner argues that Rule 177 is vague in three respects. First, he contends that Section 2(d), under which it is ordinarily improper for an attorney to offer the press an "opinion as to the guilt or innocence of a defendant," is contradicted by Section 3(a), which permits attorneys to state "without elaboration * * * the general nature of the claim or defense." Even if it had merit, however, this claim would not help petitioner, since the Nevada Supreme Court upheld the disciplinary action against him on the basis of Section 2(a) of the Rule, which covers comments on the credibility of witnesses, rather than on the basis of Section 2(d). In any event, it seems perfectly clear that an attorney can state the general nature of his client's defense without expressing an opinion as to its merits and his client's innocence. Nothing in the Rule bars an attorney from stating that his client denies the charges, which is quite different from vouching for his client's innocence. Although the prohibition against opinions on guilt or innocence is a "traditional ethical requirement" extending to the trial itself, *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d at 255, it has never been suggested that attorneys cannot effectively defend their clients without violating the rule.

Second, petitioner claims that Section 2(a) of the Rule, under which it is ordinarily improper for an attorney to comment to the press on the credibility of a witness, is inconsistent with Section 3(c), which permits an unelaborated statement that "an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved." The short answer is that nothing in Section 3(c) can reasonably be construed as authorizing comment on the credibility of witnesses. To be sure, in some cases even an unelaborated statement of the defense might tend to imply that the government's evidence should not be credited. But that is a far cry from directly attacking the credibility of individual witnesses, which is what the Rule prohibits. In any event, petitioner did not raise the alleged inconsistency between Sections 2(a) and 3(c) in the court below, and he has therefore waived that claim.

Third, petitioner argues that Rule 177 is unconstitutionally vague in that it permits an attorney to be disciplined not only when he knows, but also when he "reasonably should know," that there is a substantial likelihood that his comments will materially prejudice pending proceedings.[7] That standard, however, is a very familiar one that is found in civil and criminal law. See, *e.g.*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* § 32, at 183-185 (5th ed. 1984); 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.4, at 298 (1986); *id.* § 3.7, at 328-329. If the standard is not too vague to be employed against ordinary citizens in criminal and civil matters, surely it may be employed in disciplinary actions against attorneys, who are in a better position than ordinary citizens to shoulder the burden of inquiry it imposes. See G. Hazard & W. Hodes, *supra*, at 396.[8]

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[7] It is not clear whether petitioner also claims that the "substantial likelihood of material prejudice" standard is impermissibly vague. Suffice it to say that that test is no less self-defining than "clear and present danger" or any alternative formulation that has been upheld by the courts. It is expressed in straightforward language and requires the sort of objective measurement of factors bearing on the likelihood and degree of prejudice that attorneys, by training and experience, are fully competent to make.

[8] Petitioner relies on *In re Keller*, 693 P.2d 1211 (Mont. 1984), where the court struck down a disciplinary rule regulating extrajudicial attorney statements. The court in that case, however, relied on the rule's failure to require any particular level of threatened prejudice before attorney statements could be restricted. Rule 177, by contrast, explicitly incorporates such a standard—that of "substantial likelihood of material prejudice."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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